Lumpur, it being alleged that at that time he was in possession of certain uncustomed goods.

On the following morning he was brought before the learned President of the Sessions Court at Kuala Lumpur and charged with an offence against section 114(i)(e) of the Customs Enactment, 1936. He claimed trial and his trial was fixed for the 12th of February, 1949 at 9.15 a.m. He was granted bail in the sum of $10,000 and on the 10th of February, being a native of Sepang, he wrote to his friends at Batu Laut for the purpose of getting them to furnish the required sum for bail.

On the 12th of February when the case was called on for trial, the accused who was still in custody stated to the learned President that he had been unable at such short notice to find the sum of $10,000 necessary for bail and therefore had been unable to instruct counsel to defend him. He asked for an adjournment to enable him to brief counsel, this request was refused and the trial proceeded.

At the trial the appellant made no defence and he was accordingly convicted and fined $10,000 and his motor lorry and goods were confiscated.

Every accused person has a right, if he so desires, to be defended by an advocate, and I was of the opinion that as the appellant had been in custody since his arrest, the time given to him to instruct counsel on his behalf was insufficient. The time was also insufficient for a stranger to Kuala Lumpur to contact his friends with the object of them furnishing bail in such a sum as $10,000. He wrote to his friends on 10th February and they arrived in Kuala Lumpur on the 12th, the morning of his trial.

The appellant was therefore, in my opinion, guilty of no delay whatsoever in endeavouring to get bail and to brief counsel, and I therefore allowed the appeal and quashed the conviction without considering the merits of the case. I also ordered a new trial before a different President, the appellant to be granted bail on the same terms until the re-trial can take place.

Re-trial ordered.

BUSU v. PUBLIC PROSECUTOR

[C. A. (Willan C.J., Bostock Hill and Spenser Wilkinson JJ.) April 30, 1949]

[K. L. — F.M. Criminal Appeal No. 46 of 1949]

Evidence Enactment (Cap. 10), s. 106 — Emergency Regulations, 1948, reg. 4(1)(a) — Possession of firearm — Onus of proof that accused did not have licence for the firearm.

In this case the appellant was convicted under reg. 4(1) of the Emergency Regulations, 1948, of being in possession of a shot gun and one round of ammunition. On appeal, it was submitted that as there was no *prima facie* evidence given by the prosecution that the appellant did not have a licence for the firearm, the conviction could not stand.

Held: in view of the provisions of s. 106 of the Evidence Enactment the burden of proving that the appellant is licensed is on him and it is not the duty of the prosecution to bring *prima facie* evidence to show that the appellant had no licence in respect of the firearm in his possession.

Cases referred to:

(1) *Lim Ah Tong v. Public Prosecutor* (1948-49) M.L.J. Supp. 158.

(2) *Rex v. Oliver* 29 Cr. App. R. 137.

(3) *R. v. Turner* (1816), 5 M. & S. 206

(4) *Public Prosecutor v. Chin Yoke* (1939) F.M.S.L.R. 203, 205; (1940) M.L.J. 47, 48.

COURT OF APPEAL (CRIMINAL).

Willan C.J. : — In this case the appellant was convicted under Regulation 4(1) of the Emergency Regulations, 1948, of (a) being in possession of a single barrelled shot gun and (b) being in possession of one round of ammunition.

The charge relating to the gun reads :—

"That you, on or about the 18th day of February, 1949, in or about Kampong Tebal and Tiga Batu, in the District of Temerloh, State of Pahang, did have in your possession a fire-arm, to wit one single barrelled shot gun, not being a fire-arm which you are duly licensed to carry or possess under any written law for the time being in force and that you thereby committed an offence punishable under Regulation 4(1)(a) of the Emergency Regulations, 1948".

Mr. Hall, for the appellant, submitted that since no *prima facie* evidence had been given by the prosecution that the appellant did not have a licence for the firearm the conviction could not stand. He cited the case of *Lim Ah Tong v. Public Prosecutor*[1]. We have read the full judgment in that case and the portion of it relied upon by Mr. Hall is underlined in the following passage :—

"Finally, there is one respect in which the learned trial Judge's summing-up was rather too favourable to the appellant. He stated that the prosecution must prove that the fire-arm, which was in the possession of the accused, was unlicensed and that he had no licence to possess it. We think this puts the matter too strongly. The prosecution should give *prima facie* evidence that a fire-arm in the possession of an accused is unlicensed; but if the accused in fact had a licence this is a matter

as much within his own knowledge as the possession of a railway ticket would be in the circumstances described in Illustration (b) to s. 106 of the Evidence Enactment and it is therefore for the accused to show, if this be the fact, that he is licensed (See **Rex v. Oliver**[2])."

So far as a firearm is concerned, Regulation 4(1) of the Emergency Regulations, 1948, reads :—

"4. (1) Any person who carries or who has in his possession or under his control —

(a) any fire-arm, not being a fire-arm which he is duly licensed to carry or possess under any other written law for the time being in force .....

shall be guilty of an offence against these Regulations and shall on conviction be punishable with death.

(2) This Regulation shall not apply to any police officer or any member of His Majesty's Naval, Military or Air Forces or of any Local Forces established under any written law, or to any person authorised to carry or possess arms . . . . . without licence under any written law for the time being in force, or to any person exempted from the provisions of this Regulation by an Officer in Charge of a Police District."

Therefore, any person not being a police officer, a member of the Navy, Army, Air Force or Local Forces, who carries or possesses a firearm must :—

(a) have a licence to carry or possess, or
(b) be a person authorised to carry or possess a firearm without a licence, or
(c) be exempted from having a licence, or from being so authorised, by an Officer in Charge of a Police District.

These are the three ways in which such a person can escape liability under that Regulation.

If, therefore, it is necessary for the prosecution to call *prima facie* evidence that an accused had no licence, equally it must be necessary for them to call *prima facie* evidence regarding (b) and (c) above.

For the prosecution to adduce *prima facie* evidence regarding (a), (b) and (c) above would place an onus on them of giving negative proof regarding lack of qualifications, when in fact the existence of those qualifications is especially within the knowledge of the accused. The giving of such negative proof was decided against in the case of *R. v. Turner*[3]. In that case Bayley J. said at page 211 :—

"I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is to prove it, and not he who avers the negative."

That case was cited with approval in *R. v. Oliver*[2], in which the defendant was convicted of supplying sugar without a licence under the Sugar (Control) Order, art. 2, which reads :—

"Subject to any directions given or except under and in accordance with the terms of a licence, permit or other authority granted by or on behalf of the Minister (of Food), no . . . . . wholesaler shall by way of trade . . . . . supply . . . . any sugar".

It was submitted on behalf of the defendant in that case that the prosecution was bound to give at least sufficient evidence to prove a *prima facie* case of the absence of any licence on the part of the appellant to supply sugar. The Court of Criminal Appeal rejected that submission and held that the prosecution was under no necessity to give *prima facie* evidence of the non-existence of a licence.

In their judgment the Court of Criminal Appeal referred to the following passage in *Hawkins'* Pleas of the Crown (Vol. 2, p. 460, Chapter 89, section 17) :—

"It seems also agreed, that although the indictment state that the prisoner 'then or at any time before, not being a contractor with or authorised by the principal officers or commissioners of our Lord the King, of the navy ordnance or victuallers or victualling office, for the use of our said Lord the King, to make any stores of war, etc.', yet that it is not incumbent on the prosecutors to prove this negative averment, but that it is incumbent on the defendant to show, if the truth be so, that he is within the exception in the statute."

In our view the words underlined in that passage are opposite when compared with the following words in the charge in the appeal before us :—

"Not being a fire-arm which you are duly licensed to carry or possess under any written law for the time being in force".

Section 106 of the Evidence Enactment reads :—

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

As stated by Gordon Smith J.A. in the *Public Prosecutor v. Chin Yoke*[4] that section of the Evidence Enactment is a codification of English law in respect of cases where the burden of proof is cast upon a person of showing that he is qualified to do an act which, but for such qualification, is prohibited.

Turning now to the passage from the judgment in *Lim Ah Tong v. Public Prosecutor*[1] *supra* relied on by Mr. Hall, there is no doubt from the last part of that passage that the Court of Appeal decided in that case that it is for an accused, who carries or possesses a firearm, to show, if it be the fact, that he is licensed to do so. We do not think the words underlined in that passage set out earlier in this judgment were intended in any way to whittle down the effect of section 106 of the Evidence Enactment, and that judgment should not be read as if they do.

For these reasons we decided that, although in this present appeal the prosecution brought no *prima facie* evidence to show the appellant had no licence in respect of the firearm in his possession, no duty lay on them to do so and accordingly we dismissed this appeal.

Appeal dismissed.